

BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD
CENTRAL PUGET SOUND REGION
STATE OF WASHINGTON

POTALA VILLAGE KIRKLAND, LLC, and
LOBSANG DARGEY and TAMARA AGASSI
DARGEY,

Petitioners,

v.

CITY OF KIRKLAND,

Respondents.

CASE NO. 12-3-0005

ORDER OF DISMISSAL

SYNOPSIS

In June, 2012, Potala Village Kirkland, LLC, a Washington corporation, and Lobsang Dargey and Tamara Agassi Dargey, a married couple, challenged the City of Kirkland's adoption of Ordinance No. O-4355,¹ extending the City's moratorium on acceptance of applications for new development permits within neighborhood business (BN) zones. Petitioners complained that sequential moratoria, having been first imposed on November 15, 2011 by the enactment of a 60-day moratorium in Ordinance No. O-4335A (which was extended to May 15, 2012 with the adoption of a work plan, aimed at developing amendments to the city's Comprehensive Plan provisions and Zoning Code regulations for the BN zones, set forth in Ordinance No. O-4343)² and later extended until December 31, 2012, through the adoption of Ordinance No. O-4379 on October 16, 2012,³ were (*de facto*) development regulations in violation of the Growth Management Act, chapter 36.70A RCW, and the State Environmental Policy Act, chapter 43.21C RCW.⁴

¹ Exhibit 6.

² Exhibit 14.

³ Exhibit 43.

⁴ Petition for Review at 2-3 (June 28, 2012); Amended Petition for Review at 3-4 (December 10, 2012).

1 The parties sought and were granted a series of settlement extensions, totaling 15 weeks,
2 while the City considered and processed amendments to its comprehensive plan and
3 zoning regulations. On December 11, 2012, the City adopted Ordinance No. O-4389
4 (amending the Kirkland Comprehensive Plan);⁵ Ordinance No. O-4390 (amending the
5 Kenmore Zoning Code relating to commercial codes, including BN zones);⁶ and Resolution
6 O-4945 (amending the Design Guidelines for Pedestrian-Oriented Business Districts relating
7 to the commercial zones, including the BN zones).⁷
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10 The Board finds and concludes that Kenmore Ordinances No. O-4355 and No. O-4379
11 expired on their terms on May 15, 2012 and December 31, 2012, respectively, rendering the
12 Potala Village dispute **moot**. The Petition for Review is **dismissed**.

13 14 I. BACKGROUND

15 Petitioners alleged that the City's moratoria, above, were non-compliant with the GMA.
16 During the subsequent six months, the City considered and adopted changes to its
17 Comprehensive Plan, BN zoning regulations, and Business Zone Guidelines, culminating in
18 the enactment of Ordinances Nos. O-4389 and O-4390 and Resolution R-4945 on
19 December 11, 2012. During this six-month period, the parties jointly made three requests to
20 the Board for settlement extensions, representing that the proposed legislative changes
21 might resolve their dispute.
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24 In December 10, 2012, a Prehearing Conference was held telephonically. Petitioners Potala
25 Village Kirkland, LLC, Lobsang Dargey, and Tamara Agassi Dargey appeared through their
26 attorney, Duana Kolouskova. Respondent City of Kirkland appeared through its attorney,
27 Robin Jenkinson. Board members Margaret Pageler, Charles Mosher, and Cheryl Pflug
28 attended. The parties reported having reached an impasse in their settlement negotiations.
29 Although the City mentioned the possibility of a dispositive motion on the merits, the Board
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⁵ Exhibit 51.

⁶ Exhibit 52.

⁷ Exhibit 53.

1 was not clear that the challenged Ordinance was likely to expire without further extension.
2 A case calendar was set.

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4 The Kirkland City Council adopted amendments to its development and zoning regulations
5 on December 11, 2012. The moratorium on accepting development applications, Ordinance
6 No. O-4379, expired on December 31, 2012. On January 22, 2013, the presiding officer
7 requested supplemental briefs from the parties, *sua sponte*, asking whether the original
8 issue presented by the Petitioners remained.⁸ Supplemental briefs were received and
9 considered from both parties.⁹

11 II. DISCUSSION

12 Petitioners challenged the City of Kirkland's enactment of moratoria on new development
13 permits prior to and during the City's process of updating the City's Comprehensive Plan
14 and Zoning regulations related to its BN Zones. Kenmore has now enacted Ordinances
15 Nos. O-4389 and O-4390 and Resolution R-4945, amending its Comprehensive Plan, BN
16 zoning regulations and Zoning Guidelines. The challenged moratoria have expired and
17 development applications are again being considered, subject to these new enactments.
18 Consequently, the City asserts that the issue is moot and moves for dismissal. "A petition
19 challenging a city or county ordinance is moot if the challenged ordinance is subsequently
20 repealed or expires, the objectionable provisions are amended, or the terms are replaced by
21 a new ordinance."¹⁰

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25 Petitioners object to the City's motion to dismiss, arguing that they have been prejudiced as
26 a result of good faith participation in extended settlement negotiations and suggesting that
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28 ⁸ "Mootness is directed at jurisdiction, and as such may be raised at any time." *Citizens for Financially*
29 *Responsible Gov't v. City of Spokane*, 99 Wn.2d 339, 350 (1983).

30 ⁹ City's request to reply to Petitioners' allegations of bad faith was denied because the legal question is
jurisdiction.

31 ¹⁰ *Covington Golf v. City of Maple Valley*, CPSGMHB No. 05-3-0049, Order of Dismissal at 2 (February 7,
32 2008) citing, e.g., *Fallgatter VI v. City of Sultan*, CPSGMHB No. 07-3-0017, Final Decision and Order at 7-8
(July 9, 2007); *Giba v. City of Burien*, CPSGMHB No. 06-3-0008, Order of Dismissal at 3 (April 17, 2006);
Phoenix Development v. City of Woodinville, CPSGMHB No. 07-3-0028c, Final Decision and Order at 8-12
(Oct. 12, 2007); *King County v. Snohomish County*, CPSGMHB No. 03-3-0025 and 04-3-0012, Order of
Dismissal (May 26, 2004).

1 the City did not participate in good faith. The Board notes, however, that Petitioners' freely
2 asserted that the parties were "working in good faith"¹¹ and that "[s]ettlement negotiations ...
3 continue[d] with substantial progress,"¹² Petitioners' alternative was to proceed to hearing
4 on their challenge that the first extension of the moratorium violated RCW 36.70A.390. At
5 the time of the first settlement extension on July 19, 2012, the moratorium had been in
6 effect for 8 months.¹³ The Board considered Petitioners' assertion of a lost opportunity to
7 challenge the moratorium, but it does not reach the merits of this issue because the Board
8 does not have the power to grant relief.
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11 The Board declines to speculate as to the outcome had Petitioners chosen to prosecute
12 their challenge differently, finding that the issue of jurisdiction turns on whether the Board
13 now has authority to grant the requested relief. The GMHB was established pursuant to
14 chapter 36.70A RCW and is an independent quasi-judicial agency of the State.¹⁴ The relief
15 the Board is authorized to provide is a finding of non-compliance and/or a determination of
16 invalidity. RCW 36.70A.300; .302.¹⁵ In issuing its Final Order, "the board shall either: (a)
17 Find that the ... *city is in compliance* ...; or (b) Find that the ... *city is not in compliance*"
18 RCW 36.70A.300. The Board has no authority to grant a remedy for past non-compliance.
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21 Washington courts have held that "[a] case is moot if a court can no longer provide effective
22 relief."¹⁶ The Court of Appeals found the case moot in *Harbor Lands, LP*¹⁷ because the
23 challenged land use decision was rescinded by the City prior to entry of the Superior Court's
24 judgment. Adopting the Court's reasoning in *Harbor Lands, LP*, the CPSGMHB found that
25 "repeal of an ordinance renders an appeal to the Board moot 'because there is no currently
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27 ¹¹ Second [Joint] Stipulated Request for Temporary Stay of Proceedings at 1, September 20, 2012.

28 ¹² Joint Status Report and Motion for Extension of Time at 2, November 19, 2012.

29 ¹³ "A moratorium, may be effective for not longer than six months, but may be effective for up to one year if a
30 work plan is developed for related studies providing for such a longer period. A moratorium may be renewed
31 for one or more six-month periods if a subsequent public hearing is held and findings of fact are made prior to
32 each renewal." RCW 36.70A.390.

¹⁴ WAC 242-3-010.

¹⁵ WAC 242-3-025 states that "[t]he Board shall hear and determine ... [p]etitions alleging that a ... city is not
in compliance" (Emphasis added).

¹⁶ *Anderson v. Monroe*, CPGMHB No. 12-3-0007 at 5, Order on Dispositive Motions (December 11, 2012)
quoting *Orwick v. Seattle*, 103 Wn. 2d 249, 253, 692 P.2d 793 (1984).

¹⁷ *Harbor Lands, LP v. City of Blaine*, 146 Wn. App. 589, 595 (2008).

1 effective legislative action to challenge.”¹⁸ “[W]hen the county rescinds the challenged
2 ordinances, ‘jurisdiction to continue the case is lost. Where there are no DRs for which a
3 finding of compliance or noncompliance could be made, a board must dismiss the case.’”¹⁹
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5 Petitioners urge the board to look to *Stalheim v. Whatcom County*,²⁰ in which the Western
6 Board retained jurisdiction to review an interim ordinance that expired *the day before* the
7 Hearing on the Merits.²¹ In *Stalheim*, the County had stated that it would *continue to accept*
8 *applications under the expired ordinance for another two years*. The instant case is quite
9 different. Here, the expired ordinances are not building regulations but a moratoria, the last
10 moratorium expired 3 months before the HOM is scheduled to occur, and the City now has
11 amended development and zoning regulations in place. The Board finds *Stalheim* to be
12 inapposite.
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15 Petitioners urge the Board to adopt the “*Westerman test*” for mootness.²² In *Westerman v.*
16 *Cary*,²³ the Supreme Court recognized several factors as relevant to determining if a
17 controversy is moot.²⁴ While those factors are likely pertinent in a court with broader powers
18 of relief, the GMHB is merely a quasi-judicial tribunal with narrow jurisdiction and limited
19 authority specific to determining compliance with the GMA, SMA, and SEPA.²⁵ The only
20 remedies available to the GMHB are findings of noncompliance or invalidity leading to
21 remand for the jurisdiction to adopt compliant regulations.²⁶ It would be nonsensical for the
22 Board to enter a finding of noncompliance or invalidity for an ordinance that is no longer in
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26 ¹⁸ *Anderson v. Monroe*, CPGMHB No. 12-3-0007 at 5, Order on Dispositive Motions (December 11, 2012),
27 quoting *Gawenka*, CPSGMHB No. 00-3-0011, Order On Dispositive Motion at 3 (October 10, 2000). See, e.g.,
28 *Covington Golf*, CPSGMHB No. 05-3-0049; *Kent Cares*, CPSGMHB No. 02-3-0019.

29 ¹⁹ *Anderson v. Monroe*, CPGMHB No. 12-3-0007 at 5, quoting *ARD v. Mason County*, WWGMHB No. 01-2-
30 0017, Order on Motions (Oct. 12, 2001).

31 ²⁰ Petitioners’ Supplemental Brief at 3.

32 ²¹ WWGMHB No. 11-2-0001, Final Decision and Order (August 2, 2011).

²² Petitioners’ Supplemental Brief at 4.

²³ 125 Wn. 2d 277, 286-87, 892 P.2d 1067 (1994).

²⁴ (1) Whether the issue is of a private nature; (2) an authoritative determination is desirable to provide future guidance to public officers, (3) the issue is likely to recur, and (4) the issue is likely to escape review because the facts of the controversy are short-lived.

²⁵ WAC 242-03-025.

²⁶ WAC 242-03-820(1).

1 effect because the Board would be asking the City to repeal or amend the action when it
2 has already done so.

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4 Accordingly, the Board finds that it must have a live controversy and the authority to grant
5 the relief requested in order to have jurisdiction. The Board is sensitive to Petitioners'
6 frustration and concern that short-lived moratoria may be misused.²⁷ Nevertheless, it is the
7 expiration of the challenged action, and not the Board's recognition of that event, that
8 renders the controversy moot. Where the challenged action has expired, the Board can find
9 no live controversy for which it has the authority to grant relief under RCW 36.70A. The
10 issue is moot, the Board has no further jurisdiction and the case must be dismissed.
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12 III. ORDER

13 Based upon review of Petitioners' and the City's Supplemental Briefs, Ordinance No. O-
14 4389, Ordinance No. O-4390, Resolution R-4945, the GMA, and prior orders of the Board
15 and of the courts, the Board enters the following ORDER:
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- 18 • The City's request for leave to reply²⁸ is denied.
 - 19 • The City's adoption of Ordinance No. O-4389, Ordinance No. O-4390, and
20 Resolution R-4945 renders the Petition for Review of Ordinance No. 0-05-380
21 **moot.**
 - 22 • The matter of *Potala Village, LLC. and Lobsang Dargey and Tamara Agassi*
23 *Dargey v. City of Kirkland*, CPSGMHB Case No. 12-3-0005 is **dismissed.**
 - 24 • All further scheduled hearings on this matter are **cancelled** and the case is
25 **closed.**
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²⁷ Petitioners' Supplemental Brief at 5.

²⁸ Received February 6, 2013.

1 So ORDERED this 8th day of February, 2013.

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4 Cheryl Pflug, Board Member

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6 _____
7 Margaret A. Pageler, Board Member

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9 _____
10 Charles Mosher, Board Member

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12 **Note: This is a final decision and order of the Growth Management Hearings Board**
13 **issued pursuant to RCW 36.70A.300.²⁹**
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30 ²⁹ Should a party choose to do so, a motion for reconsideration must be filed with the Board and served on
31 all parties within ten days of mailing of the final order. WAC 242-03-830(1), WAC 242-03-840.
32 A party aggrieved by a final decision of the Board may appeal the decision to Superior Court within thirty
days as provided in RCW 34.05.514 or 36.01.050. See RCW 36.70A.300(5) and WAC 242-03-970.
It is incumbent upon the parties to review all applicable statutes and rules. The staff of the Growth
Management Hearings Board is not authorized to provide legal advice.